IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION NO.H-01-3624
	)	(Consolidated)
ENRON CORP., et al.,	)	
	)	
Defendants,	)	

Certain Insured Defendants' Opposition to Enron Task Force's Second Motion to Stay Depositions and Request for Expedited Consideration

Certain former directors and officers of Enron ("Insured Defendants")[1] file this opposition to the United States' Motion for a Limited Stay of Selected Depositions (filed June 10, 2004) ("Task Force's Second Motion").

I. Preliminary Statement

The Enron Task Force initially moved this Court to stay the depositions of eight proposed deponents. This Court denied the motion as to three of those deponents and denied the stay without prejudice as to the remaining five. (Order on United States' Motion and Memorandum of Law in Support of Its Request to Intervene and for a Limited Stay of Selected Depositions ("6/1/04 Order")). In doing so this Court noted that the deposition protocol in this case resulted from "a long and arduous negotiation by the parties" and that "[t]he schedule is extremely tight and designed to

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preclude the waste of that precious resource, time, of the many individuals who will be required to participate." (Order at 2). As the Court correctly noted then, the stay the Task Force seeks would throw this delicate deposition protocol "into a cocked hat." (Order at 3). The Task Force has now renewed its motion to stay all but one of the depositions that this Court refused "without prejudice" to stay in its prior Order.[2] The Task Force's renewed motion is a rehash of its prior arguments.[3] The Task Force offers no additional arguments to justify the stay and it remains clear that any such stay would decimate this Court's schedule and its deposition protocol. This Court should keep this case on schedule.

II. Argument

A. The Court Should Exercise Its Discretion to Deny the Task Force's Motion for a Stay.

1. This Court has Discretion to Grant or Deny the Stay.

In its June 1, 2004 Order this Court correctly recognized that it has broad discretion and that it could not cede to the Enron Task Force the Court's "duty to oversee and ensure prompt resolution of this massive case." (Order at 3); *see also McKnight v. C. H. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982) ("District court ha[s] a general discretionary power to stay proceedings before it in the control of its docket and in the interests of justice. Nevertheless, stay orders will be reversed when they are found to be immoderate or of an indefinite duration."); *Dellinger v. Mitchell*, 442 F.2d 782,

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[2]The Task Force seeks to stay the depositions of Wanda Curry, John Griebling, and Jim Fallon. The Task Force is no longer seeking to stay the deposition of Gary Peng. The parties have been told that Margaret Ceconi, the other witness whose deposition this Court refused to stay without prejudice, is in Australia and, therefore, she is not immediately available for deposition.

[3]The Insured Defendants incorporate the arguments in Certain Officers' Opposition to Enron Task Force's Motion and Memorandum of Law for a Limited Stay of Selected Depositions ("Officers' Opposition").

786 (D.C. Cir. 1971); *McSurely v. McClellan*, 426 F.2d 664, 671 (D.C. Cir. 1970); *United States v. Gieger Transfer Service, Inc.*, 174 F.R.D. 382, 385 (S.D. Miss. 1997) (rejecting request for indefinite and broad stay like that sought here).

2. The Task Force's Concerns Do Not Merit a Stay.

In its June 1, 2004 Order the Court recognized three concerns raised by the Task Force:

> [T]he Task force maintains that the taking of these depositions will (1) unduly risk disruption of the criminal prosecutions; (2) raise the danger of disclosing sensitive information from the ongoing grand jury investigation; and (3) accord to the defendants in the criminal cases, who are also defendants in the putative class action cases, discovery to which they would not be entitled under the rules and procedures governing criminal cases.

(6/1/04 Order at 2). The Court addressed each of those concerns in its prior order. Those concerns were insufficient to support the stay the Task Force requested two weeks ago and they are insufficient to derail this litigation today.

a. Civil Discovery Has Not and Will Not Disrupt the Task Force's Plans for the Witnesses.

The Court recognized that "disruption of the criminal prosecution, at least in the sense of time conflicts, can surely be worked out between the parties with the assistance of the court if necessary." (Order at 3). The Court is correct; such conflicts can surely be resolved. The Task Force does not contend that any of the three depositions at issue presents any actual conflict with any of the Task Force's plans for the witnesses.

b. Civil Discovery Will Not Inquire into Grand Jury Testimony or Statements to the Task Force.

The Court also recognized that the Task Force had claimed that civil discovery "raise[s] the danger of disclosing sensitive information from the ongoing grand jury investigation." (Order at 2).

As the Court noted, "Two of the responses assure the Court and the Task Force that inquiries into testimony before the grand jury and proposed testimony at trial will be avoided during the depositions." (Order at 3). However, the Task Force need not rely upon those assurances, because the Court ordered "that discovery not be had of any witness at any deposition taken pursuant to the Deposition Protocol Order of his or her testimony before the grand jury, the areas of his or her anticipated testimony at a criminal trial, or the content of meetings with the Enron Task Force, agents of the Federal Bureau of Investigation, or any other agencies investigating the criminal conduct surrounding the collapse of Enron Corp or Arthur Andersen." (6/1/04 Order at 4). The Task Force's second concern has been satisfied.

c. The Civil Discovery Is Not an End-Run Around the Criminal Discovery Rules.

Finally, the Court noted that the Task Force had claimed that civil discovery could "accord to the defendants in the criminal cases, who are also defendants in the putative class action cases, discovery to which they would not be entitled under the rules and procedures governing criminal trials." (Order at 2). The Court noted that this result "may not be avoidable," but also noted, "[I]t is well to remember that the Discovery Protocol Order was not negotiated in order to provide an end-run around criminal procedure rules." (Order at 3).

(1) Defendants Did Not File the Civil Case to Obtain Discovery.

The civil discovery in this case is not an end-run around the criminal discovery rules. First, in stark contrast to the cases relied upon by the Task Force, the defendants did not institute this case. The Task Force relies upon cases like *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1980), but in that case *the criminal defendant instituted the civil action* and

sought civil discovery regarding his expected indictment. The Task Force has never contended, and it could not credibly contend, that any of the criminal defendants perpetuated this case as a sham to obtain discovery. Not only did the Insured Defendants not institute this case, they each asked this Court to dismiss the case before the start of discovery.

(2) Most of the Parties Seeking Discovery Are Not Criminal Defendants.

Second, the vast majority of the parties seeking discovery are not criminal defendants. The Plaintiff class's interest would be best served by the most prompt resolution of this case possible. The defendants also seek an expeditious conclusion. Most of the Insured Defendants and all of the Outside Director defendants have nothing to do with any criminal allegations. Still, those people have been the target of damaging allegations in this lawsuit and the reputational and financial cloud those allegations cast for the past two-and-a-half years. These defendants have the right to discover evidence that will help them disprove the allegations and clear their names.

(3) The Criminal Prosecution Will Not Be Prejudiced.

Third, the Task Force has failed to explain how letting these depositions proceed could hinder its criminal prosecutions[4] and the types of prejudice that might support a stay in some cases is not

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[4]The Task Force has no general right to prevent discovery of the facts underlying either its criminal case or this civil case. *See, e.g., SEC v. Oakford*, 181 F.R.D. 269, 273 (S.D.N.Y. 1998) ("To the extent that the defendants' discovery requests result in the happenstance that in defending themselves against the serious civil charges that another government agency has chosen to file against them they obtain certain discovery that will also be helpful in the defense of their criminal case, there is no cognizable harm to the government in providing such discovery beyond its desire to maintain a tactical advantage."); *United States v. Soape*, 169 F.3d 257, 270 (5th Cir. 1999) ("As a general rule, '[w]itnesses, particularly eyewitnesses to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them.'" (quoting *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966)).

present here. The Task Force cites *Nakash v. United States Department of Justice*, 708 F. Supp. 1354, 1366 (S.D.N.Y. 1988):

> (1) the broad disclosure of the essentials of the prosecution's case may lead to perjury and manufactured evidence; (2) the revelation of the identity of prospective witnesses may create the opportunity for intimidation; (3) the criminal defendants may unfairly surprise the prosecution at trial with information developed through discovery, while the self-incrimination privilege would effectively block any attempts by the Government to discover relevant evidence from the defendants.

(United States' Motion and Memorandum of Law in Support of its Request to Intervene and for a Limited Stay of Selected Depositions ("Task Force's First Motion") at 16). The Task Force does not even hint at any danger of "manufactured evidence." For the most part, the identity of the witnesses is already known. The government does not, and could not credibly allege that any of the witnesses are likely to be intimidated by any of the defendants. There is also no danger of surprise that might justify a stay. The Government can monitor the depositions in this case and avoid any possible "surprise" at trial.[5] Especially now that the Court has prohibited inquiry into what these witnesses told the grand jury or the government, the Task Force will suffer no prejudice from examination of witnesses regarding the underlying facts necessary to defend this case.[6]

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[5]To the extent the protective order in this case might prevent the Task Force from having access to the deposition transcripts, the Insured Defendants will support an appropriate motion to amend it to give the Task Force access.

[6]The Task Force disingenuously claims that the Court's June 1, 2004 Order prohibits inquiry into any subject about which the witness may testify at trial. (Task Force's Second Motion at 7-9). That is not what the Order says; to the contrary, the Order only prohibits the parties from asking the witness to disclose his or her anticipated trial testimony. It does not prohibit inquiry concerning facts known to the witness that are relevant to this case, even if those facts may later be the subject of criminal trial testimony. (6/1/04 Order at 4). This limitation is adequate to protect the government's investigation and work product without forever precluding the parties to the civil case from discovering the facts relevant to this case.

B. The Stay the Task Force Seeks Will Disrupt and Delay this Case.

1. The Task Force's Stay Would Seem to be One of Infinite Duration.

While the Task Force characterizes its stay as limited in duration this Court has correctly recognized that "the stay sought by the Task Force would seem to be one of infinite duration." (6/1/04 Order at 1). The Task Force proposed in its first motion that the depositions be stayed "until December 1, 2004" or the conclusion of the criminal trials. (Task Force's First Motion at 1). By the time the Task Force filed its second motion thirteen days later, its date had already slipped a month and the Task Force was seeking a stay until "January 1, 2005," or the conclusion of the criminal trials. (Task Force's Second Motion at 1). In fact, as noted in the Officers' opposition to the Task Force's First Motion, the stay would extend until the conclusion of the *United States v. Jeffrey Skilling* trial that Judge Lake has not yet given even its first trial setting and which the Task Force itself acknowledges could not be set for trial until "early in 2005." (Officers' Opposition at 7; Task Force's Second Motion at 4). Moreover, the Task Force seeks a stay until "the conclusion of trials in a number of criminal cases related to the United States' investigation of the collapse of Enron Corporation." (Task Force Second Motion at 1-2). The United States writes that its criminal cases "include," but are apparently not limited to, the *Bayly*, *Rice*, and *Skilling* cases. (Motion at 2). The Task Force acknowledges that its investigation is still "ongoing and examining other acts and individuals" and may involve "other targets and subjects not yet charged." (Task Force's Second Motion at 6). The Task Force further acknowledges that the Grand Jury's term "was recently extended to September 27, 2004." (Task Force Second Motion at 4 and 6). Accordingly, the Grand Jury may yet issue additional indictments and the Task Force may try to extend the stay to the

conclusion of trials in cases that have not yet even been brought. The Task Force's stay truly seems "to be one of infinite duration."

2. The Task Force's Proposed Stay Would Delay a Broad and Undefined Group of Depositions in this Case.

It is clear that the disruption that will result from the Task Force's effort to preclude discovery will be massive and, if successful, will require a complete reworking of the discovery schedule in this case. Up until now, the Task Force has sought to stay most of the Enron witnesses noticed. Without discovery from those Enron witnesses, development of the case is crippled. As the Task Force itself acknowledges, "[M]any of the witnesses and documents the United States intends to present in the Criminal Cases also support the Class Action and will be subject to discovery and deposition in this case." (Task Force's Second Motion at 5). Therefore, one can expect that the Task Force will be seeking to delay many of the depositions central to this case. In fact, the number the Task Force will seek to delay will likely increase when the parties begin noticing higher profile witnesses.

3. The Task Force's Stay Would Destroy the Court's Schedule.

As is common in large and complex cases, each of the criminal trials has had to be reset at least once. The trial in *United States v. Skilling* has not yet seen its first setting and even the Task Force acknowledges that the first setting will not be until "early 2005." Although it is unlikely to actually be tried as early as March, 2005, even if the Skilling case begins trial then, it will not likely conclude until at least June, 2005. Discovery in this case must be *completed* by November 30,

2005.[7] If the Task Force is permitted to stay the majority of the depositions of the most critical witnesses in this case, the Court's current schedule for this case cannot be maintained.

One of the depositions the Task Force seeks to stay in its current motion illustrates the problem. The Task Force seeks to postpone the deposition of Wanda Curry, a former senior officer of Enron with knowledge of facts critical to Lead Plaintiffs' allegations concerning Enron's Wholesale Business and its Retail Energy Business. We anticipate that Ms. Curry's testimony will provide the jumping off point for a series of sequenced discovery that will follow up on, amplify, and explore what she knew about these businesses. If she cannot be deposed until, *at the earliest*, July of 2005 (or even later) the follow-on discovery will lag further behind and the schedule will fall apart. The problem becomes even more acute if–as we anticipate–the Task Force intends to preclude all inquiry into Enron Broadband (on the basis of the pending indictment in that matter), its Wholesale Trading (on the basis of the pending investigation of Enron's California trading), its International businesses (on the basis of the Nigerian Barge indictments), or the related party transactions (on the basis of the pending indictments of Messrs. Skilling and Causey).

Contrary to the Task Force's claim, the indefinite postponement of some unknown number of as yet unidentified witnesses will neither speed the conclusion of this case nor increase the efficiency of discovery. Despite now having had two opportunities to do so, the Task Force still has not explained how discovery of the underlying facts from witnesses – many of whom have already given testimony to the Examiner, to the Congress, to the Federal Energy Regulatory Commission, and/or to the Department of Labor – could possibly cause some unfair prejudice to the prosecution

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[7]If the *Skilling* case is reset even once, it may not even begin until after the deadline for discovery in this case, which would mean that much of the critical discovery would not even have *begun* as of the "firm" date by which the Court has ordered fact discovery must be complete.

in the criminal cases. By contrast, however, the prejudice to this Court, the plaintiffs, and the defendants, most of whom have nothing to do with the criminal cases, is substantial. Precious discovery time has been, and will be, lost.

III. Conclusion

As this Court noted, the depositions in this case have not and will not interfere with the Task Force's need to have the witnesses available for trial or grand jury testimony. (6/1/04 Order at 3). The parties have agreed, and more importantly, the Court has ordered, that there will be no inquiry into the witnesses' statements to the grand jury or the Task Force. The Task Force's only remaining concern, that some of the facts underlying this case may be revealed to those facing criminal charges, which this Court noted, "may not be avoidable," must yield if this case is to reach conclusion in the foreseeable future.

All parties have had to compromise to move this case along. The parties have had to focus their discovery far more sharply than they would in an ordinary case. In many instances their time for examination is measured in minutes. The parties have also had to begin depositions without all of the documents they would like to have. This Court's June 1, 2004 Order provides sufficient protections for the concerns expressed by the Task Force. This Court should not cede its "duty to oversee and ensure prompt resolution of this massive case" to the Task Force. (6/1/04 Order at 3). If it does, this case may never reach resolution.

IV. Request for Expedited Consideration

The Officer Defendants respectfully request that the Court consider this matter on an expedited basis. Under the Court's June 1, 2004 Order, all responses to the Task Force's motion are due today. Accordingly, this matter is ripe for decision. It would greatly assist the progress of

discovery if the court could expedite consideration of this matter. The depositions of Messrs. Fallon and Griebling, and that of Ms. Curry, have already been postponed for a month. Over the next week, the Deposition Scheduling Committee will be scheduling the depositions for Cycle III (August 9 to September 3). To the extent the Court believes the Task Force's Motion to stay should be denied as to one or more of these three witnesses, a prompt ruling would permit the affected witness(es) to be scheduled for that Cycle III and would lessen the prospect that a significant backlog of depositions will develop if, as we anticipate, the Task Force seeks postponement of yet additional witnesses that only recently have been designated for Cycle III

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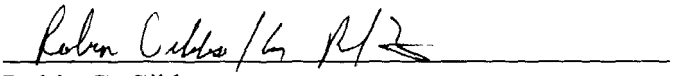

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument was served by electronic posting to www.ESL3624.com on this 15th day of June, 2004.

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